Supreme Court, U.S.
FILED

No. 091538 JUN 11 2010

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In The

Supreme Court of the United States

NORA HERNANDEZ DE GARCIA
aka CARLA HERNANDEZ-RAMOS,

Petitioner,

vs.

ERIC H. HOLDER, JR., Attorney General,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit's Summary Denial of Petitioner's Petition for Review Violated Petitioner's Constitutional Right to Meaningful Judicial Review under the Due Process Clause of the Fifth Amendment to the United States Constitution.

OPINION AND JUDGMENT BELOW

The Ninth Circuit's Order dated March 18, 2010, unreported, is reprinted at Appendix App. 1. The Board of Immigration Appeals' Order, dated July 14, 2009, unreported, is reprinted at Appendix App. 3.

STATEMENT OF COURT'S JURISDICTION

This petition for writ of certiorari seeks review of a decree issued by a court of appeal. 28 U.S.C. §1254. This Petition for Writ of Certiorari is filed within 90 days of the March 18, 2010 Order of the Ninth Circuit denying Petitioner's Motion for Reconsideration. Supreme Court Rule 13(3). The United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Supreme Court Rule 10(a).

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

The Due Process Clause of the Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

Petitioner timely petitioned the Ninth Circuit to review the Board of Immigration Appeals ("BIA") decision dated July 14, 2009, pursuant to Section 242 of the Immigration and Nationality Act, 8 U.S.C. §1252. Petitioner sought review of the BIA's decision affirming the Immigration Judge's denial of Petitioner's motion to reopen deportation proceedings.

Petitioner sought to reopen deportation proceedings on the basis that she was deceived by the Immigration Judge, believing that she had received voluntary departure when in fact she had received a deportation order. Petitioner argued that the Immigration Judge's deception justified Petitioner's delay in filing a motion to reopen and that the filing deadline for the motion was equitably tolled by the deceitful nature of the original proceeding.

In its January 25, 2010 Order of Summary Dismissal, the Ninth Circuit ruled that summary dismissal was proper where "petitioner **had not contended** that equitably tolling applies" to justify filing a motion to reopen "beyond the 90-day deadline" (emphasis added). Petitioner filed a timely motion for reconsideration. On March 18, 2010, the Ninth Circuit denied Petitioner's motion for reconsideration, stating that because "petitioner has not **established** that equitable tolling applies, the BIA did not abuse its discretion in denying petitioner's untimely motion to reopen" (emphasis in original).

ARGUMENT FOR GRANTING WRIT

The Ninth Circuit's summary dismissal departed sharply from the usual and accepted course of judicial proceedings wherein the court of appeals reviews the administrative record before rendering a decision. Federal Rule of Appellant Procedure 16. In departing from its usual course of judicial proceedings, the Ninth Circuit's summary dismissal order deprived Petitioner of her right to meaningful judicial review under the Due Process Clause of the Fifth Amendment of the United States Constitution.

The administrative record was particularly germane in this case where Ms. Garcia claimed that the audio recording of the 1995 deportation hearing supports her claim that the 1995 hearing was conducted in such a fundamentally unfair manner that she was deceived as to the nature of the deportation order. Although the administrative record was particularly germane in this case, the Ninth Circuit declined to review the record before issuing a summary dismissal based upon its finding that the facts of the case did not warrant equitable tolling of the filing deadline for Petitioner's motion to reopen.

The Ninth Circuit may grant summary dismissal where "it is manifest that the questions on which the decision in the appeal depends are so insubstantial as not to justify further proceedings . . . " Ninth Circuit Rule 3-6(b). Summary denials should be confined to appeals "obviously controlled by precedent" and not entertained where "an extensive review of the record

. . . is required." *U.S. v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (citations omitted) (emphasis added).

Ms. Garcia specifically claimed in this case that an extensive review of the record was necessary, in particular the audio recording of her 1995 deportation hearing. Ms. Garcia claimed that the Board did not even have the entire record before it to review because the immigration judge failed to forward to the BIA the key exhibit supporting Ms. Garcia's motion to reopen denied by the same immigration judge.

The right to meaningful judicial review is a core constitutional right under the Due Process Clause of the United States Constitution. *INS v. St. Cyr*, 533 U.S. 289, 314 (2001). Ms. Garcia presented the Ninth Circuit with a substantial question as to whether the BIA abused its discretion by failing to consider all of the evidence before it on Ms. Garcia's motion to reopen deportation proceedings. *Cf. Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1277 (9th Cir. 2002) (BIA abused its discretion in denying motion to reopen where it "failed to engage in substantive analysis . . . ").

Precisely because Ms. Garcia's appeal presented a substantial question for review and an extensive review of the record was necessary to rule on it, the Ninth Circuit's summary dismissal was a departure from the accepted and usual course of judicial proceedings and denied Ms. Garcia the meaningful judicial review guaranteed by the Due Process Clause of the Fifth Amendment of the United States Constitution. Accordingly, the United States Supreme Court

should grant a writ of certiorari in this case to review whether the Ninth Circuit's summary dismissal "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a).

CONCLUSION

The United States Supreme Court should accept this Petition for a Writ of Certiorari as the Ninth Circuit order departed from the usual and accepted course of judicial proceedings and in doing so, deprived Petitioner of her right under the Fifth Amendment of the United States Constitution to meaningful judicial review.

Dated as of the 11th day of June, 2010

Respectfully submitted,

STEVEN P. BRAZELTON
Attorney for Petitioner

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARLA HERNANDEZ-RAMOS, Petitioner, v. ERIC H. HOLDER Jr., Attorney General, Respondent.	No. 09-72294 Agency No. A072-957-985 ORDER (Filed Mar. 18, 2010)

Before: SILVERMAN, PAEZ and BEA, Circuit Judges.

Petitioner's motion for reconsideration is denied.

The court's January 25, 2010 order is hereby withdrawn and amended as follows.

This is a petition for review of the Board of Immigration Appeals' ("BIA") order affirming an immigration judge's order denying petitioner's motion to reopen removal proceedings.

We review for abuse of discretion the BIA's order. *Perez v. Mukasey*, 516 F.3d 770, 773 (9th Cir. 2008).

An alien who is subject to a final order of removal is limited to filing one motion to reopen removal proceedings, and that motion must be filed within 90 days of the date of entry of a final order of removal. 8 U.S.C. § 1229a(c)(7)(A), (C)(i); 8 C.F.R. § 1003.2(c)(2). Because petitioner's motion to reopen was filed beyond the 90-day deadline, and petitioner has not

established that equitable tolling applies, the BIA did not abuse its discretion in denying petitioner's untimely motion to reopen. *See id.*

Accordingly, this petition for review is summarily denied because the questions raised are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard).

The pending motion is denied as moot. The temporary stay of removal shall continue in effect until issuance of the mandate.

PETITION FOR REVIEW DENIED.

Board of Immigration Appeals Decision

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Date: JUL 14 2009

File: A072 957 985 – San Pedro, CA

In re: CARLA HERNANDEZ-RAMOS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Steven P. Brazelton, Esquire

APPLICATION: Motion to reopen

The respondent, a native citizen of Mexico, appealed from the decision of an Immigration Judge dated October 1, 2007, which denied the respondent's motion to reopen. The appeal will be dismissed.

We review findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a *de novo* standard. 8 C.F.R. §§ 1003.1(d)(3)(ii) and (iii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

The factual findings of the Immigration judge are not clearly erroneous, and we adopt and affirm the Immigration Judge's thorough and well-reasoned

decision. *Matter of Burbano,* 20 I&N Dec. 872, 874 (BIA 1994); *see generally* 8 C.F.R. § 1003.1(d)(3)(i). To challenge an executed order of deportation, the respondent must show that such order was not legally executed, *see Wiedersperg v. INS,* 896 F.2d 1179 (9th Cir. 1990) or that the prior proceeding constituted a gross miscarriage of justice. *Matter of Malone,* 11 I&N Dec. 730 (BIA 1966). As the Immigration Judge correctly found, the respondent has not demonstrated either situation. The respondent has not demonstrated that in the prior proceeding she requested or was qualified for voluntary departure. As the Immigration Judge also found, the respondent also has not timely pursued her alleged claim as the prior proceeding occurred in 1995, and she reentered the United States in 1996 and has remained here since that time. *See, e.g., Matter of R-R-,* 20 I&N Dec. 547 (BIA 1992).

ORDER: The appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD